

**MAR 24 2005**

**NOT FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON, CLERK**  
**U.S. COURT OF APPEALS**

REINALDO MARTINEZ-JARACUARO,

Petitioner,

v.

ALBERTO GONZALES,\* Attorney General,

Respondent.

No. 03-72639

Agency No. A92-186-328

MEMORANDUM\*\*

On Petition for Review of an Order of the  
Board of Immigration Appeals

Argued and Submitted February 16, 2005  
San Francisco, California

Before: ALARCÓN, SILER,\*\* and SILVERMAN, Circuit Judges.

Reinaldo Martinez-Jaracuaro, a native and citizen of Mexico, petitions for review of the decision of the Board of Immigration Appeals, which denied his request

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\* Alberto Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

\*\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\*\* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

to stay deportation proceedings pending consideration of his motion to re-serve and ordered him deported. As the parties are familiar with the facts and additional arguments, they are not repeated here.

In February 1997, Martinez-Jaracuaro pled *nolo contendere* to the offense of assault by force to commit bodily injury in violation of California Penal Code § 245(a)(1). Martinez-Jaracuaro's offense was punishable as either a felony or a misdemeanor; however, because the state trial judge never declared that he was convicted of a misdemeanor, he was convicted of a felony. *See People v. Bozigian*, 270 Cal. App. 2d 373, 379 (1969) ("Unless and until a misdemeanor sentence is imposed, a conviction for an offense alternatively punishable as a misdemeanor or a felony, remains a felony for all purposes." (citation omitted)). Accordingly, this court dismisses Martinez-Jaracuaro's petition for lack of jurisdiction because he was convicted of an aggravated felony. *See* 8 U.S.C. § 1252(a)(2)(C) (court lacks jurisdiction to review a final order of removal if alien is an aggravated felon); *Ocampo-Duran v. Ashcroft*, 254 F.3d 1133, 1134-35 (9th Cir. 2001) (one-year sentence for violation of California Penal Code § 245(a)(1) constituted an aggravated felony).

Although it was not briefed, the issue of whether Martinez-Jaracuaro is eligible for relief under § 212(c) of the Immigration and Nationality Act was raised during oral

arguments. The parties were directed to provide supplemental letter briefs. After consideration of their respective letter briefs, the court concludes that Martinez-Jaracuaro is ineligible for § 212(c) relief. *See* 8 C.F.R. § 1003.44(c) & (k)(1).

**PETITION DISMISSED.**